TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 243.

CHARLIE HESTER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

FILED MARCH 9, 1923.

(29,451)

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INDEX.

	Original.	Print.
Record from U. S. district court for the western district of South Carolina	*a*	1
Caption	*a*	1
Indictment	1	1
Minutes of trial	3	2
Verdict	4	3
Sentence	4	3
Petition for and order allowing writ of error	5	4
Writ of error	7	5
Bond on writ of error	9	5
Citation and service	12	7
Assignment of errors	13	8
Orders extending time	16	9
Bill of exceptions	18	11
Testimony of R. Q. Merrick	18	11
Jake Gosnell	23	15
J. H. King	29	21
H. I. Leoppard	31	23
R. Q. Merrick (recalled)	33	24
Motion for directed verdict and order overruling	33	25
Charge to the jury	34	26
Order settling bill of exceptions	38	28
Præcipe for transcript	39	29
Special stipulation	40	29
Clerk's memorandum	42	31
Clerk's certificate	43	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1923.

a TRANSCRIPT OF RECORD.

CAPTION.

THE UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

At a Special Term of the District Court of the United States District Court for the Western District of South Carolina Begun and Held at the Court House, in the City of Greenville, S. C., on the First Monday in January, the Same Being the 8th Day of January, A. D. 1923.

Present and presiding: Honorable H. H. Watkins, United States District Judge for the Western District of South Carolina.
Among other proceedings had were the following:

1 UNITED STATES OF AMERICA,
Western District of South Carolina:

In United States District Court.

INDICTMENT FOR REMOVING AND CONCEALING SPIRITS.

[Filed Mar. 11, 1919.]

In the District Court of the United States in and for Western District Aforesaid, at the March Term Thereof, A. D. 1919

The Grand Jurors of the United States, impaneled, sworn and charged at the Term aforesaid, of the court aforesaid, on their oaths present, that J. M. Hester and Charlie Hester on the 2nd day of February, in the year 1919, in the said division of said district, and within the jurisdiction of said court, did unlawfully remove and aid and abet in the removal of certain distilled spirits, to wit: one quart, upon which the tax imposed by law had not been paid, from a distillery to the Grand Jurors unknown, to a place other than a distillery warehouse, provided by law, to wit: Greenville County, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at the time and place and within the jurisdiction aforesaid, the said J. M. Hester and Charlie Hester, did unlawfully conceal and did aid and abet in the concealment of certain dis-

tilled spirits, to wit: one quart, which had theretofore been removed from a certain distillery to the Grand Jurors unknown, to a place other than the distillery warehouse, provided by law, to wit: Greenville County, he, the said J. M. Hester and Charlie Hester, at the time he did so conceal and did aid and abet in the concealment of said distilled spirits, then and there well knowing the same to have been removed as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

J. William Thurmond, United States Attorney.

2 Indorsement on back of indictment. No. 972. United States District Court. Western District of South Carolina. The United States vs. J. M. Hester & Charlie Hester. Indictment for—Sec. 3296 R. S. A True Bill.. W. P. Bennett, Foreman Grand Jury.

[File endorsement omitted.]

3 In United States District Court.

MINUTES OF TRIAL.

At a Special Term of the District Court of the United States for the Western District of South Carolina, begun and holden in the City of Greenville, in said District, on the 17th day of January, A. D. 1923, among other proceedings had were the following, to-wit:

Cal. No. 6. Dkt. No. 972.

UNITED STATES

vs.

CHARLIE HESTER.

Sec 3296 R. S.

Appearances: E. F. Cochran, U. S. Attorney, appeared for the Government, and H. P. Burbage, Esq., Attorney for the defendant.

This case comes on for hearing, having been sent down from the Circuit Court of Appeals for a New Trial. Plea previously entered at former trial of "Not Guilty".

The following named jurors were duly chosen, empaneled and sworn in due form of law:

J. H. Woodside.	Geo. Ruff.	K. H. Patrick.
B. W. Watkins.	Willie Banks.	R. C. Griffis.
C. M. Earle.	B. F. Tate.	J. W. Richardson.
T. L. B. Epps.	A. J. Hendrix.	J. M. Barron.

By direction of the Court J. H. Woodside was appointed Foreman of this Jury.

The following witnesses were sworn in due form of law and testified for the Government:

1. R. Q. Merrick.
2. Jake Gosnell.

Attorney H. P. Burbage moves to strike out Gosnell's testimony and argues same to the Court, same being resisted by U. S. Attorney, E. F. Cochran. The Court denies the motion, with permission for defendant's Attorney to renew his motion at the conclusion of all the testimony.

3. J. H. King.
4. H. I. Leopard.

4 Attorney H. P. Burbage now moves to exclude the testimony of Jake Gosnell and J. H. King, and argues same to the Court, being resisted by argument presented by the U. S. Attorney. The Court over-ruled the motion. Exception of Attorney H. P. Burbage to the ruling noted and allowed.

H. P. Burbage moves for a directed verdict. The motion was over-ruled.

There being no arguments to the jury, the Judge charged the jury and they retired for consideration, returning into Court with the following:

VERDICT.

We, the jury, find the defendant Charlie Hester guilty this 17th day of January, 1923.

J. H. Woodside, Foreman.

Sentence was postponed until the 22nd day of January when the Court imposed the following:

SENTENCE.

Whereupon, it is considered, ordered, and adjudged by the Court, that the said defendant, Charlie Hester, be imprisoned in the common jail of Spartanburg County, for the term of four (4) months, and that he pay a fine of two hundred ($200.00) dollars.

In open Court this the 22nd day of January, 1923.

H. H. Watkins, U. S. Judge.

In open Court Petition for Writ of Error allowed and Appeal Bond fixed at one thousand dollars, to be approved by the Court pending Writ of Error.

THE UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME.

Now comes Charlie Hester, defendant herein, by his attorney, H. P. Burbage, Esq., and respectfully shows that on the 17th day of January, A. D. nineteen hundred and twenty-three, at a special term of said Court at Greenville, South Carolina, the defendant, Charlie Hester, (J. M. Hester having been acquitted at a former term of said Court), was found guilty by a jury on the first and second counts of an indictment charging the defendant with a violation of Section 3296 Revised Statutes U. S., and upon said verdict defendant was sentenced to pay a fine of Two Hundred ($200.00) Dollars, and be confined in the Spartanburg County jail for a period of four months, and judgment was duly entered on the 22nd day of January, 1923.

Your petitioner, Charlie Hester, feeling himself aggrieved by the said verdict and sentence entered thereon as aforesaid, herewith petitions the Court for an order allowing the defendant, Charlie Hester, to prosecute a writ of error to the Supreme Court of the United States, under the laws of the United States in such cases made and provided.

Wherefore, defendant, Charlie Hester, prays that a writ of error do issue that an appeal in his behalf to the United States
6 Supreme Court aforesaid, sitting in the City of Washington, in the District of Columbia, for the correction of the errors complained of and herewith assigned, be allowed, and that all further procedings may be suspended until the determination of said writ of error by the Supreme Court of the United States.

Charlie Hester, Petitioner. H. P. Burbage,
Attorney for Defendant Charlie Hester.

Writ of error granted this the 22nd day of January, A. D. nineteen hundred and twenty-three.

(Signed) H. H. Watkins, United States District Judge, Western District of South Carolina.

7 WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable H. H. Watkins, Judge of the District Court of the United States for the Western District of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which in the said District Court, before you, or some of you, between the United States of America, plaintiff, and J. M. Hester and Charlie Hester, charged with violation of Section 3296 Revised Statutes of United States, a manifest error hath happened in so far as Charlie Hester is concerned, J. M. Hester having been acquitted at a former trial, and to the great damage of the said Charlie Hester as by his assignments of error and the record and proceedings in said cause appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States at Washington, in the District of Columbia, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this the 22 day of January, in the year of
8 our Lord one thousand nine hundred and twenty-three.

(Signed) D. C. Durham, Clerk U. S. District Court, Western District of South Carolina. (Seal.)

Allowed by (Signed) H. H. Watkins, United States District Judge, Western District of South Carolina.

9 UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

APPEARANCE BOND ON WRIT OF ERROR.

Know all men by these presents:

That we, Charlie Hester as principal, and S. W. Reams as surety, are held and firmly bound unto the United States of America in

the full and just sum of one thousand ($1,000) Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this the 23rd day of January, in the year of our Lord one thousand nine hundred and twenty-three.

Whereas, lately at the January A. D. nineteen hundred and twenty-three term of the United States District Court for the Western District of South Carolina, holden at Greenville, South Carolina, in a suit depending in said Court between the United States of America, plaintiff, and Charlie Hester, defendant, (J. M. Hester having been acquitted at a former trial of said Court), a judgment and sentence was rendered against the said Charlie Hester and the said Charlie Hester has obtained a Writ of Error from the United States Supreme Court, to reverse the judgment and sentence in the aforesaid suit, and a Citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days from and after the date of said Citation, which Citation has been duly served.

Now the condition of the above obligation is such that if the said Charlie Hester shall appear either in person or by attorney in the Supreme Court of the United States, at Washington, in the District of Columbia, on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said Writ of Error and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the Writ of Error or Appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the Western District of South Carolina on such day or days as may be appointed for a retrial of said District Court of the United States for the Western District of South Carolina, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

Charlie Hester. (L. S.) S. W. Reams. (L. S. Attest: T. E. La Grone.

THE UNITED STATES OF AMERICA,
Western District of South Carolina:

Personally appeared before me S. W. Reams who on oath says that he is surety on the within bail bond, that he is a resident and freeholder in the County of Greenville, South Carolina, and that he is worth the sum of one thousand ($1,000) Dollars over and above homestead exemption and all debts and liabilities owing by

him; that his property consists of house and lot on Hampton
11 Avenue, Greenville City, unencumbered and worth $10,-000.00 located in Greenville County.

S. W. Reams.

Sworn to and subscribed before me this the 23rd day of January, A. D. 1923.

D. C. Durham, Clerk U. S. D. C., W. D. S. C.

Approved: H. H. Watkins, U. S. District Judge, Western District of South Carolina.

12 THE UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

CITATION AND SERVICE.

To Honorable Ernest F. Cochran, United States Attorney for the Western District of South Carolina, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to the Writ of Error filed in the Clerk's office of the United States District Court for the Western District of South Carolina, at Greenville, South Carolina, wherein the said Charlie Hester is plaintiff in error, the said J. M. Hester having been acquitted, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said Charlie Hester, plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable H. H. Watkins, Judge of the United States District Court for the Western District of South Carolina, this the 22d day of January, A. D. nineteen hundred and twenty-three.

(Signed) H. H. Watkins, United States District Judge, Western District of South Carolina.

Service of copy of within Citation acknowledged at Greenville, S. C. Jan'y 22nd, 1923.

Ernest F. Cochran, U. S. Attorney.

12 THE UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

ASSIGNMENT OF ERRORS.

Now comes the defendant, Charlie Hester, (J. M. Hester having been acquitted at a former trial in said Court), in the above entitled case, and in connection with his petition for Writ of Error to the Supreme Court of the United States in this case, assigns the following errors, which the defendant, Charlie Hester, avers occurred on the trial thereof, and upon which he relies for reversal of the sentence and judgment entered herein as appears of record:

First. Because the District Court erred in permitting witnesses Jas. H. King and Jake Gosnell to testify, over defendant's objection, as to find a small quantity of untaxpaid whiskey upon the ground, after a glass vessel is alleged to have been broken by the defendant, on the ground that the discovery of said evidence, which was upon the premises of the defendant, was made without a search warrant or arrest warrant and in violation of defendant's rights secured to him under the Fourth Amendment and Fifth Amendment to the Constitution of the United States, and said evidence so secured was not admissible against the defendant at said trial.

Second. Because the District Court erred in permitting the witnesses Jas. H. King and Jake Gosnell to testify, over objection of defendant, as to seeing or observing the defendant, while
14 the latter was on his own premises, and while the said witnesses, both of whom were revenue officers, were on the defendant's premises, hand a bottle supposedly containing illicit whiskey to another person; and in permitting the said witnesses to testify, over objection of defendant, as to seeing or observing the defendant, while he and the said witnesses were all at the same time upon the defendant's premises, take a jug which presumably contained illicit whiskey from an automobile near his residence and upon his premises and run with it and break said jug upon the premises, on the ground that the discovery of said evidence was made without a search warrant or arrest warrant, and in violation of defendant's rights secured to him under the Fourth Amendment and Fifth Amendment to the Constitution of the United States, and said evidence so secured was not admissible against the defendant at said trial.

Third. Because the District Court erred in permitting the witnesses Jas. H. King and Jake Gosnell, who admitted they had no search warrant or arrest warrant, to testify, over defendant's objection, that they went to the broken vessel upon the defendant's premises and tested and smelled the whiskey upon the ground and that portion of the whiskey that remained in parts of the broken vessel, on

the ground that the discovery of said evidence was made without a search warrant or arrest warrant, and in violation of defendant's rights secured to him under the Fourth Amendment and Fifth Amendment to the Constitution of the United States, and said evidence so secured was inadmissible against the defendant at said trial.

Fourth. Because the District Court erred in not holding that the defendant, being tried for violating Section 3296 Revised Statutes of U. S., could claim the protection of the provisions of the Fourth Amendment and Fifth Amendment of the Constitution of
15 the United States which provides protection to the home, to one's papers and person from search and seizure without due process of law.

Fifth. Because the District Court erred in refusing to direct a verdict in favor of the defendant upon the ground that the evidence offered by the Government was procured without a search warrant or arrest warrant in violation of defendant's rights guaranteed to him by the Fourth Amendment and Fifth Amendment to the Constitution of the United States, and contrary to decisions of the United States Supreme Court and decisions of the Circuit Court of Appeals.

Sixth. Because the District Court erred in refusing to charge the jury that the evidence of Jas. H. King and Jake Gosnell could not be used in the consideration of the case or in determining their verdict because said evidence was obtained contrary to the provisions of the Fourth Amendment and Fifth Amendment to the Constitution of the United States.

Wherefore, for these and other errors apparent on the record, the defendant prays an appeal and supersedeas to the judgment rendered in said cause, that the same may be allowed, and that a transcript of the record, and proceedings and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States sitting in the City of Washington, in the District of Columbia, and as in duty bound will every pray.

Charlie Hester, Defendant. H. P. Burbage,
Attorney for Defendant.

16 UNITED STATES OF AMERICA.
Western District of South Carolina:

In the District Court.

[Title omitted.]

ORDER EXTENDING TIME.

The defendant, J. M. Hester, having been acquitted, and the defendant, Charlie Hester, having been convicted, and the said defendant, Charlie Hester, desiring to have a bill of exceptions settled for the purpose of a writ of error, now, on motion of H. P. Burbage, attorney for the said defendant, Charlie Hester,

It is ordered: That the present term and the jurisdiction of the Court over the above entitled cause be and is hereby extended for the purpose of presenting and having settled a bill of exceptions, for a period of sixty days from the end of the present term, provided, however, that the bill of exceptions shall be prepared and served upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement within the times and in the manner provided in Rule 44 of the rules of this Court promulgated and in effect on and after January 1st, 1923.

H. H. Watkins, U. S. Judge. January 22, 1923.

17 UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

ORDER EXTENDING TIME

It appearing to the Court that the Clerk will be unable to make a return in the above case by transmitting a true copy of the record, bill of exceptions, assignments of error and all proceedings in the case at the time required by the citation heretofore signed by this court.

Now, therefore, on motion of H. P. Burbage, Attorney for the plaintiff in error,

It is ordered: That the time for making the return in this case to the Supreme Court be and the same is hereby extended until the 31 day of March, A. D. 1923.

(Signed) H. H. Watkins, United States District Judge. January 24th A. D. 1923.

I consent:

(Signed) Ernest F. Cochran, United States Attorney.

A true copy.

Test. D. C. Durham, Clerk [Seal of United States District Court, Western District, So. Ca.]

18 UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

BILL OF EXCEPTIONS.

Be it remembered, That on the 17th day of January, 1923, at a Special Term of the United States District Court for the Western District of South Carolina, begun and holden at the City of Greenville, in the State of South Carolina, the above entitled case came on to be tried before His Honor H. H. Watkins, District Judge, presiding, and a jury; the United States being represented by Ernest F. Cochran, United States Attorney for said District, and the defendant being represented by H. P. Burbage, Esq., of the Greenville Bar, and the following proceedings were had, to-wit:

A jury was empaneled and sworn in due form of law.

The defendant was charged in an indictment containing two counts with removing and concealing one quart of untax paid liquor.

R. Q. MERRICK, a witness for the Government, being duly sworn, testified as follows:

Direct examination by Mr. Cochran:

Q. Captain Merrick, what position, if any, do you hold at present under the Federal Government?

A. Divisional Chief of Federal Prohibition Agents.

Q. How long have you held that position?

A. Nine months.

Q. What position did you hold before that?

A. Head of Field Forces in New York prior to that, and in South Carolina a year to that and Deputy Collector of Revenue
19 eighteen years ago, and have continued in that work except for a year and a half in the army.

Q. In your work as Deputy Collector did you have occasion when registered distilleries were in operation, registered under the Act of Congress, to visit those distilleries and become familiar with their mode of operation?

A. I did.

Q. Prior to that time that you were Deputy Collector, were you engaged in any capacity at a registered distillery?

A. I kept books for about a year in the Richland Distillery Company in Columbia.

Q. When was that?

A. Twenty years ago.

Q. Was that a large plant?

A. Yes sir. Turned out about 5,000 gallons of liquor a day.

Q. Are you thoroughly familiar with the mode of operations of Government distilleries?

A. I am.

Q. During your service as Deputy Collector, and since as Prohibition Agent, have you had occasion to raid or destroy what is known as mountain moonshine liquor and illicit plants?

A. I have.

Q. Those not under Government supervision?

A. I have.

Q. In the course of your duties did you learn the mode of operation of those illicit distilleries?

A. I did.

Q. Now, Mr. Merrick, is there a difference in the way whiskey is manufactured at these registered distilleries and at these blockade, moonshine, illicit ones?

A. There is.

Q. In the method—does it make a difference in the product?

A. It does.

Q. Can a man or you or anyone who has become expert at it tell the difference between what is made at a Government distillery and has the tax paid on it before it can be removed, and what is produced at these illicit distilleries?

A. Yes sir, I can tell the difference.

Q. State how that difference arises—what causes it?

A. I will tell you first how whiskey is made at a Government distillery—a registered distillery. This mash is made and places in the beer tub and there fermentes about seventy-two hours.

Q. Mash from meal or rye?

A. In this section it has always been corn meal with some rye meal and barley malt. Those are the usual ingredients. That beer sets about seventy-two hours and is then ready for distillation. Under the regulations in the Government distilleries it must set so long and no longer and such a time and no shorter. Sweet mash in distilleries runs seventy-two hours and sour mash ninety-six hours. When this whiskey begins running from the worm, the storekeeper and guager is in the cistern room. They have in the cistern room two whiskey tanks—one known as a high wine tank and the other known as a low wine tank. When the whiskey begins running, it increases in strength—starts off about one hundred proof and runs up to about one hundred and thirty, and then gradually gets weaker, runs down again, and the store-keeper and guager stands there with his hydrometer cup and stem, takes the proof of spirits, and when it gets to a hundred, back to a hundred, he changes the flow from the worm to the low wine tank and the remainder of the spirits that come from that during that run is what is known as the low wine.

Q. Is there another name for that?

A. Yes sir. It is known as backings in the mountains. The whiskey in the high wines is more than one hundred proof—probably about one hundred and twelve proof. That whiskey has to be warehoused at one hundred proof—at no more and no less. The store-keeper according to the regulations adds so much water to these spirits in the high wine tank.

Q. Pure water?

A. Yes sir—pure water until the proof is exactly one hundred. It is then put in barrels and rolled in the warehouse. The whiskey in the low wine tank is put back and repeated.

Q. The backings or low wine are put back in to be redistilled and come out as fresh whiskey?

A. Yes sir.

Q. In the majority of these registered distilleries or in all of them, aren't they running from 25 to 30 gallons a day?

A. They run four tubs—one is filled on Monday morning and one on Tuesday morning and one on Wednesday morning. The one filled on Monday morning is ready for distilling on Thursday.

Mr. Burbage: I have listened here to what the witness has been saying but we object to this testimony on the ground that this whiskey—any particular whiskey—we are accused of having hasn't any connection with this testimony. He hasn't testified that he has examined any whiskey found in our possession.

The Court: I'll admit the testimony now and if it isn't shown to be relevant, I'll strike it out.

21 Witness (continuing): The tub that is filled on Monday morning is distilled on Thursday. They only need three tubs to make this continuous run of whiskey. They use four tubs in order that on the fourth day the tub is scalded and aired, whitewashed, and then it is used the following day. Now, at blockade distilleries, they don't use any particular care as to airing and whitewashing the tubs, and in running off the whiskey, they run it in a bucket or a tub and the distiller watches and when it drops the bead, which it does at one hundred, they set that tub aside because that is high wine also. Then they catch the remainder called backings, which at government distilleries is called low wine, and when the backings are complete, they are set aside and started over again but they reduce the spirits of these high wines by adding a third as much backings or low wine. If the run turned out three gallons of high wine or whiskey, they would add one gallon of backings to that, and that reduces it to about one hundred proof according to the way they made it. I have proofed it and it usually runs about one hundred.

Q. Tell the jury what is contained in those backings as distinguished from the other? The high wine?

A. Practically the refuse or remainder, and that contains more fusel oil, and it has a ranker taste and ranker smell, and anybody who is familiar with it can tell low wine or backings from the whiskey.

Q. What is the effect of making the final product where you reduce it by spring water—pure water—and reduce it by backings?

A. In Government distilled whiskey, it is clearer—it is purer and sweeter—has a pleasant taste. The other has the rank taste or backings. You can also smell it in blockade whiskey.

Q. Does it make a difference in the color?

A. Yes sir, a slight difference in the color but the biggest difference is in the taste.

Q. Is it easy to tell the difference?

A. I can tell it and I think any man who is familiar with it can tell it.

Q. Are there any other differences—what about the cleanliness.

A. The Government distiller prides himself on his cleanli-
22 ness. He keeps his apparatus clean.

Q. Is he required to do that?

A. Yes sir. The Government regulations require it.

Q. Are these blockade distilleries in buildings?

A. They are out in the open.

Q. You say they are not very clean?

A. No sir.

Q. In the Government distilleries do they add any exciting principles? That is—to make fermentation proceed?

A. Every Government distiller has his own brand of yeast he uses. They have a distiller's yeast.

Q. Do they use anything like concentrated lye in the Government distilleries to excite fermentation?

A. No sir.

Q. What about sugar?

A. Not unless it is so stated in the survey. They are surveyed to run meal or rye. I have known of sugar being used.

Q. What about in blockade distilleries, do they use anything besides yeast?

A. Up till a few years ago they used barley malt or some rye. You can't get barley malt any more but they can now use wheat shorts, sugar and magic yeast.

The Court: You say a few years ago, one could get barley malt? What about in 1919?

A. They could get it until the War Revenue Act—until 1917, I think it was passed.

Q. Did you say whether they used lye at blockade distilleries or not?

A. I have seen very little used. I have heard of more of it that I have seen.

Q. That make a difference in the product?

A. Yes sir.

The Court: Does it make a difference in the appearance?

A. Not any great difference. The biggest differences would be in the taste and smell.

Q. You say not so much difference in the appearance?

A. No sir—not very much but there is a little difference in the color sometimes. Mostly in the taste and smell.

Q. Could you give us some description of the taste? I believe you said the Government distilled whiskey was sweeter?

A. Yes sir.

Q. Is fusel oil poisonous?

A. Yes sir.

Q. The object is to prevent that from going out in good liquor?

A. Yes sir.

Q. In the backings, is there a larger proportion of the oil?
A. Yes sir.

No cross-examination.

23 Mr. Burbage: I have no questions to ask but I still don't see the relevancy.

The Court: If he fails to connect up this testimony, I'll strike it out.

JAKE GOSNELL, a witness for the Government, after first being duly sworn, testified as follows:

Direct examination by Mr. Cochran:

Q. What position, if any, do you hold under the Federal Government?
A. Federal Prohibition Agent.
Q. What position did you hold in 1916?
A. Deputy Collector, and I also had a commission as a Federal Prohibition Agent at the time.
Q. Now—in 1919, that was before the prohibition act was passed?
A. Yes sir. I was under the impression that I had that commission then. I was just Deputy Collector at that time. I did hold both for sometime.
Q. Well on the second of February, 1919, you were a Deputy Collector, and later you were a Prohibition Agent?
A. Yes sir.
Q. Do you know the defendant, Charlie Hester?
A. Yes sir.
Q. Just state now in your own way what occurred on that day—about the 2nd of February, 1919?
A. On that day, in company with Mr. King, we were riding up the road above Travelers Rest about a mile. On getting even with Hester's house—we had destroyed distilleries near his house before, and we had information that he kept whiskey there.

Mr. Burbage: I move to strike that out.
The Court: I'll strike that out. Gentlemen, you are not to consider that statement. He can't state what his information was.

Q. That was J. M. Hester's house?
A. Yes sir.
Q. The father of this boy?
A. Yes sir.
Q. What happened?
A. Right in front of the house—his house,—an automobile stopped and a boy by the name of Henderson got out and went to the house. We drove on by the house, and I got out in some little pines beside the road. A railroad was to the right of us and I crossed the railroad in the direction of the Hester house and went through the pines.

On getting near the house, I *seed* Hester give Henderson
24 a bottle.

Mr. Burbage: We object. I wish to ask the witness if he had an arrest warrant or a search warrant.

A. No sir.

Mr. Burbage: I move that his testimony be stricken out. We object unless he had a search warrant or an arrest warrant.

The Court: What evidence is there that this testimony was secured by an illegal search?

Mr. Burbage: It was on the premises of the defendant.

The Court (to witness): Where were you at that time?

A. In the pasture near Hester's house—sort of between Hester's house and the road.

Mr. Cochran (to witness): Weren't other people going in there?

A. Yes sir.

Mr. Burbage: How far was that from the house?

A. About fifty or seventy-five yards from the house.

Mr. Cochran: Was the pasture cut off by the fence?

A. Yes sir. There was a road that ran up to the house and a barn next to me, and I had just crossed the fence when I *seed* the bottle pass.

The Court: This was on the opposite side of the house?

A. Yes sir.

Mr. Burbage: That was a private road?

A. It went on back of the house.

Mr. Burbage: No house between you and him?

A. Yes sir.

Mr. Burbage: You say it was fifty or seventy-five yards?

A. Yes sir.

The Court: I am going to admit the testimony now and then you can renew your motion.

Mr Cochran continuing:

Q. What did you first see?

A. The first thing I *seed* was Hester hand the bottle to Henderson.

Q. Were they back of the house?

A. They were in the road that runs back of the house.

Q. You saw him hand him a bottle?

A. Yes sir.

Q. That was to Henderson?

A. Yes sir.

Q. What happened then?

25 A. Henderson's mother was sitting in the car in the public road and hollered to him.

Q. Did you say Hester's mother or Henderson's mother?

A. Henderson's mother. He broke and ran back to Hester's house, Henderson did, with the whiskey in his hand. On getting about even with the house, he was joined by Charlie Hester.

Mr. Burbage: We object to all this testimony.

The Court: It is understood that your objection applies to all this testimony.

Witness: Hester reached in the car and grabbed a gallon jug.

Mr. Burbage: We object to this testimony on the same ground but in addition, on the ground that we are not charged here with having but only a quart of illicit whiskey.

The Court: I overrule that objection on that ground.

Mr. Cochran: Go ahead.

A. I followed the two boys. They both ran right along together. When they went near the spring Hester went to the left and Henderson to the right. About that time, I fired my pistol.

Q. What was the object in that?

A. I thought maybe he would stop. It was about 150 or 200 yards beyond the house at the time. Hester throwed down his jug and broke it about half in two and there was about a quart of whiskey left in the jug.

Q. There was about a quart of whiskey left in the jug?

A. Yes sir.

Q. Did you examine it?

A. Yes sir.

Q. Did you taste and smell it?

A. Yes sir.

The Court: How far was that from the house?

A. Two hundred yards from the house.

Q. Mr. Gosnell, are you familiar with the say registered distilleries are operated?

A. Yes sir.

Q. Are you familiar with their products?

A. Yes sir. When I was about eighteen years old, I worked in a Government distillery.

Q. Do you know how it is manufactured?

A. Yes sir. I was with the *guager* and worked around in the distillery. I *seed* him and *hope* him take off the whiskey.

Q. Do you know how they made blockade whiskey?

A. Not at that time.

Q. Do you know how it was made in 1919?

A. Yes sir. I raided my first distillery about 22 years ago. It is very easy to tell the difference in the odor and taste of moon-
26 shine blockade whiskey and in government distilled whiskey.

Q. Did you taste this whiskey?

A. Yes sir. I stuck my finger down in it. I tasted it and smelled it.

Q. What kind was it?

A. Corn and sugar whiskey.

Q. Was it made the way Government whiskey is made?

A. No sir.

Q. Was it or not produced at a Government distillery in your opinion?

A. No sir. It was what I know as new corn whiskey—blockade whiskey.

Q. What part of the county was that in?

A. About a mile above Travelers Rest.

Q. In this County?

A. Yes sir.

Q. Are there any Government distilleries near there?

A. No sir.

Q. Do you know how long it had been since there were any Government distilleries at that time in South Carolina?

A. Not since about 1911.

Q. Do you know how long since they have been out in North Carolina?

A. I don't know in which they went out first. I thought they went out in North Carolina first?

Q. What about Georgia?

A. It was about that time in all three of the States, I think. The odor of the whiskey that Charlie throwed down was the same odor as that Henderson throwed down.

Q. Were there any Government tax stamps on those vessels?

A. No sir.

Q. What happened after that?

A. After that we went down to this whiskey where he throwed the jug down. We come back to the house there were several people drinking there.

Q. Were they there before you got there?

A. Yes sir. They were eight or ten people there before we got there.

Q. Out in the yard?

A. Yes sir.

Q. Go ahead?

A. We come back to the house and got in the car and come down the road. On our way we overtook Henderson who I recognized as being the man I seed with the bottle.

Q. They had both thrown down the bottle?

A. Yes sir.

Q. Did you go then and leave there?

A. Yes sir. We left there.

The Court: What was the difference between this whiskey and whiskey produced at a registered distillery?

A. Well—if I had the two kinds here, I could tell you which was which. One had more *verdigrease* in it.

The Court: Which has more of it?

A. Blockade. It is tempered down with backings, and in
27 the other liquor, the proof is brought down by water.

The Court: You say you smelled this whiskey?

A. Yes sir.

The Court: Did you taste it?

A. Yes sir. I stuck my finger in it to see whether it was whiskey.

The Court: Was it different from Government distilled whiskey? What is the difference?

A. Yes sir. One has a ranker taste and smell—the same kind of whiskey we find at those blockade distilleries.

Mr. Cochran, continuing:

Q. In the whiskey produced at a Government distillery and the whiskey produced at a blockade distillery, is there a difference in the color?

A. Yes sir. The whiskey at a Government distillery is nice and clear, and it also has a different smell from the other.

Q. After it ages does it get a little different color?

A. Yes sir—as it gets older, and it smells different if it is kept in a keg.

Q. Was this whiskey an old product or a raw, new one?

A. It was what I called right new whiskey made of corn and sugar.

Q. Can you tell when sugar has been used by the taste?

A. Yes sir. I can tell when sugar has been used in it.

Cross-examination by Mr. Burbage.

Q. Mr. Charlie Hester lived there with his father?

A. Yes sir.

—. When you first saw him you were in the pasture?

A. I was in the pasture back of the barn, sort of between the public road and the house.

Q. On Hester's land?

A. I suppose it was. I was right near the fence.

Q. How far were you from him?

A. Fifty or seventy-five yards.

Q. You testified at the first trial that it was one hundred yard-?

A. I might have. I was fifty or one hundred yards, I just guessed at it.

Q. You had no search warrant or arrest warrant?

A. No sir.

Q. Mr. King, your companion, had no search warrant or arrest warrant?

A. No sir.

Q. You state while one hundred yards away you say you saw Charlie Hester hand Henderson a quart bottle of whiskey?

A. I would know him two hundred yards away.

Q. Did you see him hand Henderson a quart bottle of whiskey?

A. Yes sir, I seed him hand him the bottle.

28 Q. Didn't you testify at the first trial that it looked like a quart bottle?

A. Yes sir I did—it looked like a quart bottle.

Q. You were then on the premises of Hester?

A. Yes sir, I think I was.

Mr. Cochran: Which Hester?
Mr. Burbage: He said he lived with his father.
Q. When you examined this whiskey on the ground, were you on Hester's premises?
A. Yes sir, I expect I was, I was right near the spring.
Q. How far from the house?
A. Two hundred yards, I suppose.
Q. Did you *fo* up to the house?
—. I went by the house.
Q. How close to it—how many feet from the house?
A. I expect I ran between the automobile and the house—as close as from me to the desk (indicating Judge's Bench).
Q. A few feet?
A. Yes sir.
Q. Right through the yard?
A. Yes. In the road running in the direction of the spring.

The Court: You were in the road?
A. Yes sir. I got over the fence before I got to the house.

Q. It was a little private road leading from the house to the farm?
A. I followed the road and it went on to another house.
Q. On the same plantation?
A. No sir. I think it was off that plantation.
Q. That little road near the Hester home is between the house and the farm?
A. Yes sir.
Q. The automobile that you have reference to was sitting in the yard?
A. Yes sir.
Q. And you saw Hester take a bottle out of that car?
A. Yes sir.
Q. Whose car was it?
A. The car belonged to a man named Leopard.
Q. Was it seized by the Government?
A. I think Mr. King did.
Q. Was it ever sold?
A. I don't know.
Q. Leopard is one of your witnesses in this case?
A. I don't know.
Q. You used him against Henderson when Henderson was tried?
A. Yes sir.
Q. When you did this shooting, were you on the premises of Hester?
A. I expect I was. It was somewhere near the spring.
Q. Did you go in the house?
A. I don't remember whether I did or not. I know I did see Mr. King and Hester talking and Hester invited him to come in. I don't remember whether I went in or not.

Q. You say you could identify Charlie Hester two hundred
29 yards?
A. Yes sir.

Q. And the liquor?
A. I couldn't say about the liquor but I know his reputation.
Q. Don't you know that it is a physical impossibility to recognize a man two hundred yards?
A. I can do it. I can see you walking and know you three or four hundred yards.

Mr. Burbage: I wish I had your vision. That's all.
Mr. Burbage renews objection to the testimony on same ground.

J. H. KING, a witness for the Government, after first being duly sworn, testified as follows:

Mr. Burbage: At this stage, I wish to ask that all of the testimony of the witness, Jake Gosnell, be stricken out.
The Court: For the present, I refuse that motion but I will permit you to renew it.

Direct examination by Mr. Cochran:

Q. What position, if any, dod you hold under the Federal Government in 1919?
A. General Deputy Collector.
Q. Were you present with Mr. Gosnell at the time he went down to J. M. Hester's house?
A. Yes sir.
Q. When you got down there where did you go first?
A. As a result of information, we left Greenville on Sunday afternoon, February 2nd. We drove up to about a mile beyond Travelers Rest opposite the house where J. M. Hester lives. We saw a car standing in the road, the main road. We drove berond the car to the turn in the side of the hill. Mr. Gosnell got out and went across the lot. I came back in our car and as I came back, I saw a young man running from the car in the main road back to Hester's house and saw Jake Gosnell behind him. We couldn't get our car over the railroad and I got back and run towards the house. As I approached the house, perhaps fifteen or twenty yards, I saw young Hester take a gallon jug out of an automobile at the left of the house, start off and throw it down and run.

Mr. Burbage renews his objection to the testimony.

Witness, continuing: I did not follow him, I came around the side of the house, to the right, and there were perhaps eight or ten people there, most of them drunk. I searched them for
30 liquor and firearms. Somebody said "Get the gun". Mr. J. M. Hester started in the house. I followed him and picked up the shot gun near the door and unbreached it. It was empty. I then started to search the house inside and an old lady was there and she said there was no liquor in the house, so I went out. I did not search after she told me that. I went out the front door and on the right hand side of the house there was a fruit jar that had

just been thrown down and broken that had contained blockade whiskey.

Q. Was there any left in it?

A. There was perhaps a gill left in the small jar.

Q. Did you taste it and examine it?

A. No sir. Not at that time. I then went back and examined the gallon bottle and there was perhaps a quart in it. About that time, Jake returned and we examined the liquor in the gallon jug. We then returned to the corner of the house where the glass jar was. We examined that. I seized the automobile, a Ford automobile, which young Hester had taken the gallon of liquor out of. While we were there at the house, several cars drove up in the main road and J. M. Hester would walk close to the road and as these cars would stop, he would speak to them and they would leave. We then got ready to leave. The car belonged to man named Leopard.

Q. The car that was seized?

A. Yes sir. We brought Leoppard down with us. At that time, we hadn't caught Hester or Henderson. We brought Leoppard in with us. When we came back to the road, J. M. Hester's brother was there talking to two or three men in some sort of truck. We got down to the cross roads at Travelers Rest and I came in in Henderson's car and Jake came back in his own car. We ran across Henderson and recognized him and brought him in.

Q. You say you tasted and examined that liquor?

A. Yes sir.

Q. Is there a difference between distilled spirits made at a Government distillery and liquor made at a blockade distillery?

A. Yes sir.

Q. What is the main difference?

A. There is a slight difference in the color and an extreme difference in the taste and smell.

Q. Can a person tell that difference?

A. Yes sir.

Q. Have you seen enough of those differences to be able to tell the difference?

A. Yes sir.

Q. What was the taste and smell of that liquor?

31 A. It tasted rank, and it smelled rank but the color was a kind of whitish—not a milk white but a betwixt and between.

Q. Was that liquor in these two vessels there that day produced at a Government distillery, and had the tax paid on it or was it produced at a blockade distillery?

A. It was produced at a blockade distillery. About three days after that, as a result of information——

Mr. Burbage: We object to that.

Mr. Cochran: That's all right. You needn't tell about that.

Cross-examination by Mr. Burbage:

Q. You had no search warrant?

A. No sir.

Q. You had no arrest warrant?
A. No sir. We didn't arrest anybody.
Q. You did not have either warrant when you went in the house searching for whiskey or on the ground when you searched for whiskey?
A. No sir.
Q. That was where they lived?
A. Yes sir.
The Court: What was that about three or four days afterwards?
A. We made another search in the same place.

The Court: That's all.

H. I. LEOPPARD, a witness for the Government, after first being duly sworn, testified as follows:

Direct examination by Mr. Cochran:

Q. Where do you live?
A. I live at Simpsonville.
Q. Do you know Charlie Hester?
A. Not very well but I am acquainted with him.
Q. You know him when you see him?
A. Yes sir. I have saw him.
Q. Were you down there at J. M. Hester's on the 2nd day of February, 1919, when the officers came there?
A. Yes sir.
Q. What did you see Charlie Hester do?
A. There was some man come there and said something about some whiskey and Charlie Hester went off and came back with some.
Q. Where did he go?
A. I don't know.
Q. How long was he gone?
A. I don't know.
Q. A few minutes?
A. I suppose five minutes.
Q. What occurred then?
A. He handed it to this man and started to leave and in some way saw these fellows and started back the other way.
32 Q. What size vessel was it in?
A. It was a quart size.
Q. What happened then? Did you see the officers chase him?
A. Yes sir. I saw them. They went down back of the house.
Q. Did you see the vessels broken?
A. No sir.
Q. That was after they got out of your sight?
A. Yes sir.
Q. Did Gosnell chase him?
A. Yes sir.
Q. What did Hester do after that? What did you see Hester do with reference to the car?

A. I didn't see him do anything at all.
Q. Did you see him take the liquor out of the car?
A. No sir.
Q. You did see him hand the bottle to Henderson?
A. Yes sir.
Q. Where were you and where was Hester when he first started to go get the liquor?
A. Out in the yard.

Cross-examination by Mr. Burbage:

Q. That was your car the Government seized?
A. Yes sir.
Q. It has never been sold?
A. No sir.
Q. That was about three or four years ago?
A. Yes sir
Q. They stated that Hester took this liquor out of the car and threw it down. Were you not out there most of the time?
A. Yes sir, but I was in the house part of the time.
Q. Were you out in the yard when the officers came upon the premises?
A. Yes sir.
Q. From the time they came on the premises until Jake Gosnell shot, were you by your automobile?
A. I couldn't say, I was in the yard. Mr. King searched all of us out there.
Q. Before they searched, you saw them coming up the big road?
A. I saw Mr. King but Mr. Gosnell was about at the house before I saw him.
Q. While they were coming or before their arrival, you were standing there by your automobile? In the yard?
A. I was there near the house.
Q. You saw nobody put any whiskey in your car?
A. No sir.
Q. You saw nobody take it out?
A. No sir.
Q. You testified before that you didn't know whether there was whiskey in the bottle or not?
A. Yes sir. I can't swear what was in it.

33 Redirect by Mr. Cochran:

Q. What did he ask him?
A. He said that he wanted some whiskey.
Q. Were there any stamps on it?
A. I don't know.

R. Q. Merrick, a witness for the Government, recalled.

Direct by Mr. Cochran:

Q. Were you in the Government service when the last registered distilleries in South Carolina were closed down?

A. Yes sir.
Q. When was the last one closed down here?
A. I think it was the John H. Trammel distillery in Greenville County. I think that was the last one and it must have been about fifteen or sixteen years ago.
Q. What about in North Carolina?
A. It was subsequent to that. It was about ten years ago.
Q. When in Georgia?
A. It was before they were closed down in South Carolina.

Cross-examination by Mr. Burbage:

Q. It was at that time lawful to buy whiskey in this state?
A. What time?
Q. At the time of this occurrence, he could buy whiskey lawfully from outside of the state?
A. Yes sir. He could get a quart a month.

Redirect examination by Mr. Cochran:

Q. But he had to get a permit from the Probate Judge?
A. Yes sir, and he had to sign at the express office for it.

Government rests.

The foregoing constitutes all of the evidence introduced. The testimony of R. Q. Merrick as an expert could not be condensed and be properly understood, and the testimony of the remaining witnesses is set forth in full, same being necessary to a proper understanding of the questions presented.

Mr. Burbage: I wish to move again that the testimony of Mr. King and Mr. Gosnell be stricken out for the reasons set forth in my first motion.

After argument by counsel in the cause, the Court announced that the motion of Mr. Burbage for the exclusion of the testimony of Mr. Gosnell and Mr. King was denied, and same overruled.
An exception to this ruling of the Court was taken and allowed.

MOTION FOR DIRECTED VERDICT.

Mr. Burbage then moved for a directed verdict as follows:

"We would ask Your Honor for a directed verdict on the
34 ground that the testimony introduced in this court by Mr. King and Mr. Gosnell is inadmissible because of the fact that the witnesses for the Government entered the premises of the defendant without a search warrant or arrest warrant or other due process of law and that such testimony obtained to be used against the defendant is in direct conflict with the Fifth Amendment of the Constitution and also in direct conflict with the decisions of the Circuit Court of Appeals and of the United States Supreme Court."

The motion for a directed verdict was overruled, and exception taken and allowed.

Mr. Cochran stated that it had been agreed to submit the case to the jury without argument.

Mr. Burbage made an oral request to charge the jury that if the testimony was obtained by the officers in the manner stated by them, that same could not be considered by the Jury in their findings.

The Court: In order that the whole question may be brought up fully, I am going to deliver my charge to the jury, then if there's anything to which either side wishes to direct my attention they can do it and take exceptions.

CHARGE TO THE JURY.

MR. FOREMAN AND GENTLEMEN OF THE JURY:

You will observe in this case that there are two defendants whose names appear in this indictment—that is to say—J. M. Hester and Charles Hester. The case has already been disposed of as to J. M. Hester, the jury having rendered a verdict of not guilty as to him in a former trial. You are, therefore, to inquire whether the defendant, Charles Hester, is guilty of either one of the two charges contained in this indictment or both of them, or whether he is not guilty of either or of both. The case is brought under what is known as the Revenue Laws of the United States, the alleged offense having been asserted to have been committed before the National Prohibition Law went into effect—before the Eighteenth Amendment of the Constitution went into effect. At that time, the right of the Government to assume jurisdiction in a case of this sort was because of its right to impose a tax upon the manufacture, sale and disposition of intoxicating liquors for the purpose of raising revenue to support the Government. Under the new law, the Federal Government has a right to pass laws and has passed laws regarding the manufacture and sale of whiskey as police measures but here the Government has jurisdiction because of the acts, it complains of having been committed, were acts which deprived it of a revenue to which its laws entitled it. The first charge in the indictment is that on the second day of February, 1919, the defendant, Charles Hester, did unlawfully remove, and aid and abet in the removal of certain distilled spirits, to wit: one quart, upon which the tax imposed by law had not been paid, from a distillery to the grand jurors unknown to a place other than a distillery warehouse provided by law, and that this was done in Greenville County. The second count charges that he unlawfully concealed, and aided and abetted in the concealment of that same whiskey at the same time, knowing at the time he did conceal, aid and abet in the concealment of it, that it had been removed from a distillery to a place other than a distillery warehouse. The law provided that all whiskey lawfully manufactured should not after its manufacture at a distillery—at what is known as a Government distillery—a licensed distillery—be taken any where from the distillery except to the distillery ware-

house. That was the place provided by law where it would be measured, where the tax would be ascertained and levied and paid upon the quantity that might be there stored, and taking it from a distillery any where else than to such a place was a violation of the law until it had been properly taken there and the tax paid as provided by law. Now—when the whiskey was taken to this distillery warehouse and the tax paid, once paid, it could be handled
36 by anyone without violating the law unless he engaged in selling it as a wholesaler or retailer. A man could buy it and drink it and take it about from place to place without violating the Federal Law and that is the law we are here considering. Now, there is a special provision of law applicable to a case of this sort and that is this—that under this law, which was in force at the time and by which this case must be judged, where more than five gallons of whickey was found in a package, that package must have on it a Government stamp indicating the payment of the tax. That was a receipt that showed it was not contraband. If the package contained five gallons or more, it must have that stamp on it and the absence of such stamp was prima facie evidence that the tax had not been paid—but less than five gallons, such as is alleged in this indictment, did not have to have any stamp on it. I don't know whether any of you are familiar with the old bar room days or not. You know that there was a time when whiskey was sold throughout the country pretty generally. There were bar rooms all over the state—a man might go to a bar keeper who had a barrel of whiskey and have a quart drawn from that barrel and take it home without a stamp on it and he was not liable for violating this law unless he knew that that whiskey had not had the tax paid upon it. But if he went to a moonshine distillery and got that whiskey and knew that the tax had not been paid, even though he did not have but a quart or a pint, he would be violating this law. But while in a charge against one violating this law, of removing and concealing distilled spirits, it required that the one who wished to protect himself for having more than five gallons in his possession should have the stamp as an evidence of its being legal, it did not require that of him in having a less amount. If one was found with a less amount than that, and the Government wished to convict him of violating this law, the Government not only had to show that he was transporting or removing or concealing the quart or any quantity up to five gallons but it had to show, and beyond a reasonable doubt, to the satisfaction of the jury, by competent evidence, that that whiskey was
37 whiskey upon which the tax had not been paid. So in this case, before you can convict the defendant, Charlie Hester, the Government must satisfy you beyond a reasonable doubt that he removed or concealed, or both, this whiskey which he is charged with removing and concealing and must satisfy you beyond a reasonable doubt that he had the whiskey and took it somewhere other than to a distillery warehouse or concealed it and it must also be proved that the tax had not been paid on it and that must be shown by competent evidence beyond a reasonable doubt. You heard the testimony of this officers. Does this so satisfy you? Was this

whiskey upon which the tax had been paid or was it what is called moonshine or blockade whiskey, meaning by that—whiskey upon which the tax had not been paid, made at an illicit distillery upon which the Government was then entitled to a tax, and did Charlie Hester know that was true? Now—you take into consideration what the officers said as to how the whiskey was made and as to whether they knew it was such whiskey or not. You must be satisfied not only that they believed that it was but their testimony must show that they understood and knew what they were talking about. If such be the case, if you find that this was whiskey upon which the tax had not been paid, and that the defendant, Charlie Hester, was removing it and concealing it in violation of the law, and you are satisfied of that beyond a reasonable doubt, you find him guilty. If you entertain a reasonable doubt about it, your verdict would be not guilty.

Is there anything further?

Mr. Cochran: Nothing further for the Government.

Mr. Burbage: I don't know whether I understood your Honor's charge or not. Did you charge that the law presumes that the tax has been paid on quantities less than five gallons?

The Court: I charge this—that in case of whiskey in quantities of less than five gallons, there is no presumption that the tax has not been paid because of the absence of a stamp but that
38 before one can be convicted in such a case, it must not only be proved that he had the whiskey and removed it or concealed it but it must also be proved to the satisfaction of the jury beyond a reasonable doubt that the tax had not been paid upon it. I think that covers it.

Mr. Burbage: We except to that portion of Your Honor's charge which refers to the testimony of the two Government officers, Mr. King and Mr. Gosnell, on the same grounds set out before.

Exception taken and allowed.

Wherefore, the defendant prays that this his bill of exceptions may be allowed, settled and signed.

H. P. Burbage, Attorney for Defendant.

ORDER SETTLING BILL OF EXCEPTIONS.

Settled and allowed this the 21st day of February, A. D. nineteen hundred and twenty-three.

H. H. Watkins, United States District Judge,
Western District of South Carolina.

39 UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

PRÆCIPE FOR TRANSCRIPT.

To D. C. Durham, Esq., clerk of said court:

You are notified that pursuant to the rules of the Supreme Court of the United States the following portions of the record shall be incorporated in the transcript of the record on the writ of error in the above entitled cause:

1. Indictment.
2. Plea.
3. Verdict.
4. Sentence.
5. Joinder of Issue, or minutes of trial.
6. Petition for Writ of Error, and Order allowing same.
7. Writ of Error.
8. Writ of Error Bond.
9. Citation and Acceptance of Service.
10. Assignment of Errors.
11. All Orders extending time.
12. Bill of Exceptions.
13. Special stipulation dated Feby. 12th, 1923.

H. P. Burbage, Attorney for Plaintiff in Error. Date: Feby. 12th, 1923.

Service of a copy of the within præcipe acknowledged this Feb'y 12th, 1923.

Ernest F. Cochran, U. S. Attorney.

40 THE UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

[Title omitted.]

SPECIAL STIPULATION.

It is stipulated and agreed by and between the District Attorney for the United States and the Attorney for defendants as follows:

First. That at the first trial in the District Court the defendant J. M. Hester was acquitted and the defendant Charlie Hester convicted and sentenced and the defendant Charlie Hester thereupon sued out a Writ of Error from the Circuit Court of Appeals for the

Fourth Circuit on the sole ground that there was not sufficient evidence presented by the Government to sustain the allegation that the tax on the spirits in question had not been paid and the judgment of the District Court was reversed by the Circuit Court of Appeals and the case remanded for a new trial and upon the second trial in the District Court of the defendant, Charlie Hester, the Government presented additional evidence to sustain the allegation that the tax had not been paid and the defendant, Charlie Hester was again convicted and sentenced and has now sued out a writ of error from the Supreme Court of the United States on an entirely different ground from the ground of the assignment of error on the former appeal to the Circuit Court of Appeals.

Second. It is further stipulated and agreed that in view of the foregoing facts, the question presented in the Supreme Court on this Writ of Error being entirely different from the question presented on the former appeal in the Circuit Court of Appeals, it is unnecessary that the proceedings of the hearing in the Circuit Court of Appeals be set forth in the transcript of record to be transmitted by the Clerk of the District Court to the Clerk of the Supreme Court for the purpose of the present Writ of Error from the Su-
41 preme Court, and the Clerk of the District Court is hereby directed to omit from said transcript to be sent to the Clerk of the Supreme Court, the following; to wit:

1st. The verdict of the jury on the first trial, finding the defendant Charlie Hester guilty, the same having been set aside by the Circuit Court of Appeals.

2nd. The first sentence against the defendant, Charlie Hester, the same having been set aside by the Circuit Court of Appeals.

3rd. The Writ of Error, citation, mandate, and other proceedings in the Circuit Court of Appeals.

Third. The Clerk of the District Court shall include this special stipulation in the transcript of the record to be sent to the Clerk of the Supreme Court.

Fourth. Nothing in this stipulation contained shall be construed to authorize the Clerk of the District Court to omit from the transcript of record portions of the record necessary for the hearing in the Supreme Court as set forth in the notice by the Attorney for the plaintiff in error to said Clerk, dated February 12, 1923, it being the purpose of this stipulation only to omit from the record those parts of the record which were used to perfect the Writ of Error in the Circuit Court of Appeals and to make this stipulation and the statements contained in this stipulation stand in lieu of such omitted parts.

Dated February 12th, 1923.

Ernest F. Cochran, U. S. Attorney. H. P. Burbage, Attorney for Defendant Charlie Hester.

42 In United States District Court.

MEMORANDUM.

Petition for Writ of Error filed January 22, 1923.
Order allowing same filed January 22, 1923.
Assignment of Errors filed January 22, 1923.
Writ of Error issued and filed January 22, 1923.
Copy lodged for adverse party January 22, 1923.
Appearance Bond on Writ of Error filed January 23, 1923.
Citation filed January 22, 1923.
Acceptance of Service by District Atty. January 22, 1923.
Order Extending time for filing Bill of Exceptions filed January 22, 1923.
Order Extending time for Clerk to make Return to Supreme Court filed January 24, 1923.
Notice (or Stipulation) filed February 21, 1923.
Special Stipulation filed February 21, 1923.
Bond for Costs filed.

43 In United States District Court.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Western District of South Carolina:

In the District Court.

I, D. C. Durham, Clerk of the District Court of the United States for the Western District of South Carolina, do certify that the foregoing is a true copy of the record, and of all proceedings in the case of The United States, Plaintiff, vs. Charlie Hester, Defendant, as agreed upon by counsel, and as appears by the records now on file in my office.

Given under my hand and seal of said Court, at Greenville, S. C., in the District aforesaid, this the 3rd day of March A. D. 1923.

D. C. Durham, Clerk U. S. D. C., W. D. S. C. (Seal United States District Court, Western District So. Ca.)

Endorsed on cover: File No. 29,451. W. South Carolina D. C. U. S. Term No. 243. Charlie Hester, plaintiff in error, vs. The United States of America. Filed March 9th, 1923. File No. 29,451.

SEP 26 1923
WM. R. STANSBURY
CLERK

No. 243

In the Supreme Court of the United States

OCTOBER TERM 1923.

CHARLIE HESTER, *Plaintiff in Error,*

versus

THE UNITED STATES OF AMERICA,
Defendant in Error.

In error to the District Court of the United States for the Western District of South Carolina

BRIEF SUBMITTED FOR PLAINTIFF IN ERROR

In the Supreme Court of the United States

OCTOBER TERM 1923.

CHARLIE HESTER, *Plaintifff in Error,*

versus

THE UNITED STATES OF AMERICA,
Defendant in Error.

In error to the District Court of the United States for the Western District of South Carolina.

H. P. Burbage and Richard A. Ford,
Attorneys for Plaintiff in error.

STATEMENT OF THE CASE

The plaintiff in Error (Defendant below) was convicted at a term of the District Court of the United States for the Western District of South Carolina begun and holden in the City of Greenville, said District, on the 17th day of January, 1923, upon an indictment charging a violation of section 3296 of the Revenue Laws of the United States, and was sentenced, after a postponement of sentence from January 17th to January 22nd, to serve four months in the Spartanburg jail and to pay a fine of two hundred dollars, from which sentence he appeals.

The Government offered and took the testimony of witnesses R. O. Merrick (Record PP. 11 to 15), Jake Gosnell (Record PP. 15 to 21), J. H. King (Record PP. 21 to 23), H. J. Leopard (Record PP.

23 to 24) and R. Q. Merrick recalled (Record PP. 24 to 25). When it appeared that Jake Gosnell and J. H. King were Revenue officers and that they had no search warrant or arrest warrant, (Record PP. 16, 17, 21, 22 and 23), Defendant's counsel objected to their testimony on the ground that the testimony was inadmissable because the same was illegally obtained.

The defendant offered no testimony after the Government rested its case (Record P. 25). Defendant's counsel thereupon moved the court to have stricken out the testimony of Jake Gosnell and J. H. King for the same reasons as those set forth in his first motion (Record P. 25). The Court, after argument by counsel, announced that the motion of defendant's counsel for the exclusion of the testimony of Mr. Gosnell and Mr. King was denied, and the same overruled (Record P. 25).

An exception to this ruling of the court was taken and allowed.

The substance of the evidence complained of, and to the admission of which error is imputed, is as follows: (Record PP. 15 to 23): In February, 1919, the officers, both of whom were in the employ of the Revenue Department, without either a search warrant or an arrest warrant, went upon the premises and into the dwelling house of J. H. Hester, the father of Charlie Hester, the defendant, the latter at the time making his home at the same place and in the same house with his father. The officers saw an automobile stop in front of the Hester home and saw a man by the name of Henderson get out and go into the house. Gosnell testified that he and King got out of their car and went into a patch of pines beside the road; that on arriving near the Hester dwelling house he saw Hester give Henderson a bottle. When he saw this transaction he was in the Hester pasture—about 50 or 75 yards from the house. Henderson ran when some one hollered at him, and as he ran towards the house he carried the bottle in his

hand, and in a few minutes Charlie Hester joined him near the house and Hester reached into an automobile standng right at the house and took out a gallon jug. The two men ran a short distance, one going one way, the other another, and Gosnell fired his pistol as he was pursuing Henderson. Hester threw his jug down near the house and broke the receptacle and spilled the contents thereof. Gosnell testified that he stooped down, tasted and smelled the whiskey and knew that it was not tax-paid whiskey. This happened upon the premises of the defendant.

J. H. King searched everybody at the Hester home for firearms and liquor. He found no whiskey upon any of them. After being told by an old lady in the house that there was no whiskey in there, he went out without searching the house. Everything he and Gosnell saw, did or heard on this occasion was while they were upon the premises of Hester. Neither he nor Gosnell had a search warrant or an arrest warrant.

After the Court refused defendant's counsel's motion to exclude the testimony of Gosnell and King, motion was made for a directed verdict on the ground that such testimony was inadmissable because of the fact that the witnesses for the Government entered upon the premises of the defendant without a search warrant or an arrest warrant or other due process of law, and that such testimony obtained and used against the defendant is in direct conflict with the Fourth and Fifth Amendments to the Constitution, and also because the same was in direct conflict with the decisions of the Circuit Court of Appeals and of the United States Supreme Court, (Record P. 25). Motion for directed verdict was overruled by the Court (Record P. 25).

After the Court had finished charging the jury, defendant's counsel excepted to that portion of the Court's charge "which refers to the testimony

of the two Government officers, Mr. King and Mr. Gosnell, on the same ground as set out before."

BRIEF OF THE ARGUMENT

There is in reality only one question raised throughout the trial of this case, and whether raised before the testimony was given or while it was being given, or whether raised when motion was made for the exclusion of certain testimony, for a directed verdict, or otherwise, there is nothing for this court to consider but that *one* glaring question which must be answered—*was* the testimony of Jake Gosnell and J. H. King admissable? The assignment of error challenges the ruling of the court below that such testimony was competent and admissable, even though it was obtained without due process of law—without a search warrant or an arrest warrant.

The Fourth Amendment to the United States Constitution very explicitly provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against ureasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It appears to us that if there ever was one case which grievously offended and disregarded the above Amendment, the case at bar is the one. We observe officers Gosnell and King, without search warrant, although they claim they had "information," going upon the premises of the defendant, going into the little country home—humble it is true yet the castle of the accused and his parents—going into the very bed-room of that home; searching the people gathered there, whether gathered for lawful or unlawful purposes; and, finally, one of the offfcers, while still upon the premises of the accused, pursuing the accused and

one of his companions, shooting as he pursues. We are sometimes found asking ourselves, "Were it better to honor and obey the provisions of the greatest document ever penned by man, or to run rough-shod over that sacred instrument, in order that those suspected of violating some trivial law may be punished?" It appears to us that the one who violates our Constitution is a greater violator of law than he who violates a revenue law. We may be in error in this respect, but think not.

The fifth Amendment to the Constitution provides, among other things, that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

The vital question presented here, therefore, is, was Charlie Hester, by the conduct of Gosnell and King acquiring information in the way they did, compelled to give testimony against himself?

It appears to us that there can be no doubt about the fact that the defendant was compelled to give testimony against himself, and if so, there was "an energetic disregard of the Fifth Amendment," to quote from the opinion of Judge Walter Evans of Kentucky, in the case of U. S. vs. Robert Meyers.

We think the following cases are practically on all-fours with the case under discussion: Boyd vs. U. S. 116. U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Weeks vs. U. S. 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915 B. 834, Ann. Cas. 1915 C. 1177; Silverthorne Lumber Company vs. U. S. 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Gouled vs. U. S. 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; Amos vs. U. S. 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654.

Besides the foregoing cases, we would respectfully call the court's attention to the very recent case heard by this court—M. Frank Andrews vs. U. S. Vol. 43—

No. 10, page 360 Supreme Court Reporter, which case, we respectfully submit is of similiar nature to the one now under consideration. In the Andrews case, in which judgment was reversed, upon confession of error by the defendant in error, a man's house was searched with an *invalid* warrant. In our case *no* warrant was used in searching the premises. It seems to us that if a man's home is searched with an *invalid* warrant and the highest court of the land declares that the testimony thus obtained is inadmissable—that such was contrary to the Fourth and Fifth Amendments to the constitution—certainly, without our appearing to be of an ipse dixit make-up, the searching of another's home is unlawful and the testimony thus obtained is inadmissable—contrary to the same Amendments.

The only objection the opposing side could possibly raise to the above conclusions would be one of a very frail, frivolous and hair-splitting nature. They might argue that, since the bulk of the evidence was obtained by the Government's witnesses, King and Gosnell, while they were on the land of the defendant, adjacent to the dwelling house, and not *in* his dwelling house, this would not be a case of a defendant being compelled to furnish testimony against himself.

It is a universal doctrine that if a person's smoke-house or other out-house is within the curtilage of the dwelling house, the thief entering such out-house is as guilty of burglary as though he had entered the sacred precinct of the owner's bed-room. As to the question of curtilage the same is true as regards arson. The lawmakers saw fit to fix a certain distance in cases of burglary and arson. They saw the wisdom of making the home reach further than the four walls occupied by the owner and his family. But the law goes still further in case of an invasion of a man's *castle*, the universal doctrine being that such owner has a right to repel the invader even though it takes

him to the last inch of his holdings. The only curtilage considered by law, in a case of this kind, is the "last ditch." Suppose the officers had been ordered away from the dwelling house by the Hesters and the officers had refused to do as requested, what would have been the result? Most assuredly such officers would have been, in the eyes of the law, trespassers. Suppose they had obeyed such a request, but still persisted in remaining upon the farm, within ten feet or a hundred yards of the dwelling house, would not the law still consider such officers trespassers, and would not the owner have the legal right to even take the life of those thus invading the castle or lingering upon any portion of the realty? We think there can be no doubt about this being a correct and sound principle of law.

In conclusion, we can only say that, it having been shown that the home of the defendant was invaded and searched without a warrant, the defendant was compelled to furnish testimony against himself, the testimony was inadmissable against the defendant and the proceedings in this respect in the lower court were in direct and positive conflict with the Fourth and Fifth Amendments and in conflict with the decisions of this Honorable Court. We are not attempting to furnish to the court an elaborate argument, literally saturated with State, Circuit and U. S. court decisions. We have only attempted to show the facts briefly, to point out the grievous errors below and ask and demand that, not only the rights of this humble defendant be protected, but the rights of all the American people be protected from unreasonable searches and seizures.

Respectfully,

September 12th, 1923.

H. P. Burbage,
Richard A. Ford.
Attorneys for Plaintiff in Error.

INDEX.

	Page
Statement	1
Assignments of Error	6
Argument:	
I. There was no search or seizure of the defendant's person, house, papers, or effects	7
II. Even if there was a search and seizure without warrant, it was not unreasonable	8
III. Defendant was not compelled to be a witness against himself	20
Conclusion	22

AUTHORITIES CITED.

Constitution and Statutes:	
U. S. Const., Fourth Amendment	6
Fifth Amendment	6
Criminal Code, Sec. 335	16
Revised Statutes, Sec. 3177	19
Sec. 3296	1, 16
Sec. 3298	20
Sec. 3299	18, 20
Sec. 3453	19
Title XXXV, Chap. 11	20
Cases:	
Adams v. *New York*, 192 U. S. 585	8
Agnello v. *United States*, 290 Fed. 671	9, 16
Boyd v. *United States*, 116 U. S. 616	11, 12, 19, 20
Burt v. *Smith*, 181 N. Y. 1	10
Gouled v. *United States*, 255 U. S. 298	8, 9
Green v. *United States*, 289 Fed. 236	9, 10
Hale v. *Henkel*, 201 U. S. 43	7
Haywood v. *United States*, 268 Fed. 795	12
Herine v. *United States*, 276 Fed. 806	17
Kathriner v. *United States*, 276 Fed. 808	17
Lambert v. *United States*, 282 Fed. 413	9
McBride v. *United States*, 284 Fed. 416	17
Morrill, Ex parte, 35 Fed. 261	18
O'Connor v. *United States*, 281 Fed. 396	19
Runo v. *Williams*, 162 Calif. 444	10
Sioux Falls, City of, v. *Walser*, 187 N. W. (S. Dak.) 821	12
United States v. *Bateman*, 278 Fed. 231	9
United States v. *Fears*, Fed. Case No. 15080 (3 Woods, 510, Cir. Ct. N. Dist. Ga.)	20

Cases—Continued. Page.

United States v. *Fenton*, 268 Fed. 221 19
United States v. *Hilsinger*, 284 Fed. 585 ..... 17, 19
United States v. *McBride*, 287 Fed. 214 14
United States v. *Snyder*, 278 Fed. 650 19
United States v. *Welsh*, 247 Fed. 239 13
Vachina v. *United States*, 283 Fed. 35 17
Weeks v. *United States*, 232 U. S. 383 21
Welsh v. *United States*, 267 Fed. 819 19

Miscellaneous:

Wigmore on Evidence, 2d Ed., Vol. V, Secs. 2183, 2264 ... 8
3 A. L. R. Anno., pp. 1514–1522; 20 id., 652–654; 24 id., 1408–1426 22
59 Lawyers Repts. Anno., pp. 465–477; id., 1915–B, 834–843; 1916–E, 715–717 22

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

CHARLIE HESTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 243.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT.

The defendant below seeks reversal of a judgment of conviction entered upon the verdict of a jury after trial on an indictment (R. 1–2), charging in two counts that he removed and concealed, and aided and abetted in the removal and concealment, of one quart of distilled spirits, in violation of Section 3296, Revised Statutes of the United States (Comp. Stats., 1918, Sec. 6038; Act of July 20, 1868, c. 186, s. 36; 15 Stat. 140), which reads as follows:

> *Removal or concealment of spirits contrary to law.*—Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place

> other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

The statement of the case presented by the plaintiff in error is controverted. In order to aid the court in understanding the somewhat unsatisfactory record, a summary of the testimony of the two witnesses, Gosnell and King, by which plaintiff in error claims he has been deprived of his constitutional rights, will be given.

Gosnell and King were deputy internal-revenue collectors. On the 2d of February, 1919, "as a result of information" (R. 15, 21), they proceeded from Greenville, South Carolina, to the home of J. M. Hester, the father of plaintiff in error, Charlie Hester, with whom the latter lived. (R. 19, 20.) As they came within the vicinity of the Hester place they saw a car stop in the main road in front of the house. A boy named Henderson got out and went to the house. They drove on past the house to a

point some distance beyond, where Gosnell got out of the car and went into some small pines beside the road. (R. 15, 21.) He then approached the house through a lot or pasture which was between the house and the main road. (R. 16, 21.) When about 75 yards from the house he saw Charlie Hester hand Henderson a bottle. (R. 16, 19.) He *thinks* he was then on the Hester premises. (R. 19.) Hester and Henderson were at the time in a private road leading from the main road by the Hester house and barn to a house on another plantation. (R. 16, 20.) Henderson's mother, who was sitting in the car in the main road, gave an alarm. Henderson, with the bottle in his hand, ran back to the house, where he was joined by Hester. (R. 16.) Hester reached in a car standing near the house in the yard and grabbed a gallon jug. (R. 17, 20.) The car belonged to one Leopard. (R. 20, 22.) The two boys then ran along the private road back of the house with Gosnell in pursuit. (R. 17.) Gosnell ran through the yard within a few feet of the house as he gave chase. (R. 20.) The boys ran along together until near a spring, about 200 yards from the house, when they separated, Hester going to the left and Henderson to the right. About this time Gosnell fired his pistol. He thought maybe "he" would stop. (R. 17.) Hester threw down the jug and it broke half in two, but about a quart of whisky remained in it. Gosnell examined the whisky and found it was moonshine or blockade whisky. (R. 17.)

Henderson also dropped his bottle and the odor of the whisky in it was the same. (R. 18.) Gosnell *expects* he was then on the Hester premises. (R. 20.) He then returned to the house, but does not remember entering it. (R. 20.)

During this time King came back to the house by the main road. As he approached the house he saw Henderson running toward the house with the bottle and he also saw Hester grab the jug out of the car and flee, but he did not follow. When he came to the house he found eight or ten people there, most of them drunk. He searched them for liquor and fire-arms. He started to search the house, but an old lady said there was no liquor in the house, so he did not search it. (R. 21.) He went out the front door and on the right side of the house was a fruit jar which had just been thrown down and broken and which had contained blockade whisky. There was perhaps a gill left in the jar. He then went back to where the gallon jug was dropped and, with Gosnell, examined the liquor left in it. They returned to the house. (R. 18, 22.) People were drinking there. (R. 18.) King seized the automobile from which Hester had taken the jug. They brought Leopard to the city with them. While at the house they saw cars drive up the main road. J. M. Hester walked close to the road, and as the cars stopped he spoke to them and they left. Up to this time Hester and Henderson had not been apprehended. (R. 22.) In returning to

the city the officers overtook Henderson and brought him in. (R. 18, 22.) But they did not arrest anybody. (R. 23.) They had no arrest warrant or search warrant. (R. 16, 19, 23.)

As to the character of the whisky, the testimony shows that the officers were familiar with both Government registered distillery whisky and moonshine or blockade whisky and were qualified to tell the difference between them. (R. 17, 22.) King had worked in a registered distillery, and he also knew how blockade whisky was made. (R. 17.) In fact, it is very easy to tell the difference in odor and taste between moonshine whisky and registered distillery whisky. Blockade whisky has more verdigris in it. It is tempered down with backings; in the other the proof is brought down by water. (R. 18.) Blockade distillery whisky has a ranker taste and smell. Government distilled whisky is nice and clear, and it has a different smell from the other. (R. 19, 22.) They examined, tasted, and smelled the whisky here in question. (R. 17, 22.) It tasted and smelled rank. The color was a kind of whitish—not a milk white, but a "betwixt and between." (R. 22.) It was raw, new corn, and sugar whisky. (R. 17, 18, 19, 22.) It was not made the way registered distilled whisky is made. It was moonshine or blockade whisky. (R. 18, 22.) No Government tax stamps were on the vessels. (R. 18.) There were no Government distilleries near there; none in South Carolina since 1911. (R. 18.)

The constitutional provisions involved are:

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment:

> No person * * * shall be compelled in any criminal case to be a witness against himself. * * *

ASSIGNMENTS OF ERROR.

The six assignments of error are in substance and effect that the defendant was denied the protection of the Fourth and Fifth Amendments to the Constitution of the United States by errors of the trial court in overruling his objections to the testimony of Gosnell and King as to information obtained by them while they were unlawfully on his premises; that his right to be secure against unreasonable searches and seizures was thereby violated; and that he was compelled in a criminal case to be a witness against himself. (R. 8–9.)

ARGUMENT.

I.

There was no search or seizure of the defendant's person, house, papers, or effects.

A search implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner. *Hale* v. *Henkel*, 201 U. S. 43, 76. Here there was in fact no search or seizure.

Even admitting that Officer Gosnell was on the Hester premises when the bottle was passed, which does not clearly appear, no search or seizure had yet been attempted. Before an arrest and a search could be made the property was dashed to the ground, evidently with the purpose of destroying it. It was therefore abandoned, even conceding that defendant had a property right in it. There can be no seizure of abandoned property. It is true a shot was fired by the officer, but, according to the testimony, this was for the purpose of stopping the defendant. He did not stop, and there is nothing to show that the shot forced him to drop the whisky. The fair inference is that defendant dashed the jug to the ground for the purpose of destroying the evidence of his crime. The same is true as to the bottle dropped by Henderson and as to the fruit jar thrown down by the side of the house and broken. The house was not searched. While Officer King searched the people about the house, the evidence does not show that any liquor was found on them, so defendant was not prejudiced.

The defendant himself voluntarily had disclosed the whisky and his connection with it to the view of the officers, and had abandoned the liquor before the officers ascertained its nature. The officers did not take the whisky from defendant or from his premises. It was not used as evidence against the defendant. The officers testified only as to what they saw defendant do and what they learned from an examination of the whisky after he had thrown it away. It is immaterial whether this information was obtained on defendant's premises, or whether it was procured in an irregular or even illegal manner. A trespasser may testify to pertinent facts observed by him. For the trespass he may be held responsible, but his testimony is not thereby rendered incompetent. The English and nearly all the American cases have declined to extend the security intended to be guaranteed by the Fourth Amendment to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent. *Adams* v. *New York*, 192 U. S. 585, 596, 598; Wigmore on Evidence, 2nd Ed., Vol. V, Secs. 2183, 2264.

II.

Even if there was a search and seizure without warrant, it was not unreasonable.

Not all searches and seizures without warrant violate the right guaranteed by the Fourth Amendment.

In *Gouled* v. *United States*, 255 U. S. 298, 301, this court said:

> Every search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment. It is the right and duty of the Government to secure evidence of crime, even from the accused himself, if this can be done without violating his constitutional rights.

In *Green* v. *United States*, 289 Fed. 236, 238, the court said:

> It is settled that this Amendment contains no prohibition against arrest, search, or seizure without a warrant, but only denounces unreasonable searches and seizures.

A search under a warrant may be unreasonable, and a search without warrant may be reasonable. Reasonableness is the test. What is reasonable or unreasonable is a judicial question which must be determined in each case upon the particular facts presented. *Gouled* v. *United States*, *supra*; *Agnello* v. *United States*, 290 Fed. 671, 676, certiorari granted April 30, 1923, 262 U. S. 738; *Lambert* v. *United States*, 282 Fed. 413, 417; *United States* v. *Bateman*, 278 Fed. 231.

One of the tests of reasonableness is whether there was probable cause to believe that a crime was being committed in the presence of the officer. Where the facts within the knowledge of the officer are such as to warrant a reasonable person in concluding that a crime is being committed, then it is being committed in his presence, within legal contemplation, and arrest and seizure without warrant are not

unreasonable. Probable cause has been defined as follows:

> Probable cause which will justify an arrest is reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense of which he is suspected. (*Green* v. *United States*, 289 Fed. 236, 238.)
>
> Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief. (*Kuno* v. *Williams*, 162 Cal. 444, 451.)
>
> Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in his belief that he has lawful grounds for prosecuting the defendant in the manner complained of. (*Burt* v. *Smith*, 181 N. Y. 1, 5.)

Probable cause is not actual and positive personal knowledge. If such positive knowledge were required in advance of a warrant or prior to an arrest and search without warrant, few arrests could be made. Probable cause is no more than a fair inference from known facts. In *Green* v. *United States*, *supra*, the defendants had for some time been under surveillance as suspected dealers in narcotic drugs. One day they were seen carrying a grip and entering a drug store, which was a notorious rendezvous for peddlers of narcotics, the proprietor of which was then under indictment. They were arrested and a search of their grip was made without a warrant, and it was held that there was probable cause for the search and that the same was not unreasonable.

Another distinguishing feature between a reasonable and unreasonable search and seizure is the character of the property taken and the object of the seizure. Property in which the public has no legal interest, but is of value only as evidence of a crime or of the intent to commit a crime, may not be seized. Property, however, in which the public is presumed to have a legal interest because it is more than mere evidence of crime, and which is the fruit of crime or the means or instrumentality by which it is committed, constitutes a legitimate object of search and seizure. It is part of the *corpus delicti*. Such property includes stolen goods, burglars' tools, implements of gambling, excisable articles, intoxicating liquor and the implements for its illicit manufacture. *Boyd* v. *United States*, 116 U. S. 616, 623, 624. And, of course, illicit distilled spirits fall within this class.

So with respect to the purpose of the seizure, it is an elementary legal principle that, a crime having been completed, no right of search or seizure on the part of the governmental agencies exists for the purpose of obtaining evidence which may be desired to prove the fact of a crime or the identity of the criminal who committed it. This would amount indirectly to compelling a person to give evidence against himself. "In this regard the Fourth and Fifth Amendments run almost into each other." *Boyd* v. *United States*, *supra*, p. 630. A search and seizure is justified, however, if its purpose is to suppress the commission of a continuing crime. These

principles are clearly announced in the following cases:

Boyd v. *United States*, 116 U. S. 616, 623:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property; in the other it is not.

Haywood v. *United States*, 268 Fed. 795, 803:

> Not all searches and seizures are forbidden. Consider, first, the character of the property that may be seized. It has never been deemed unreasonable to hunt for and take stolen property, smuggled goods, implements of crime, and the like. Inasmuch as the documents in question were the tools by means of which the defendants were committing the felonies, there was no immunity in the nature of the property.

City of Sioux Falls v. *Walser*, 187 N. W. Rep. (S. Dak.) 821, 823:

> There is a wide distinction between the seizure of property lawfully in the possession of a person and the seizure of property which is being held and used in violation of law, and in and to which property, because of such violation of law, the person in possession can claim no property rights.

United States v. *Welsh*, 247 Fed. 239, 240:

> The cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers can not be seized and used as incriminating evidence. The *corpus delicti* itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is in no real sense the property of the defendant, but is the very unlawful thing imported contrary to the statute. I think the district attorney is right in urging that anyone could arrest the person carrying it, who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment, and from the evidence adduced, that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected.

United States v. *McBride*, 287 Fed. 214, 218:

> In considering what may be seized, the law draws a clear distinction between things forfeited, or that it was illegal for the person to have, and his mere private books and papers, etc., which contained evidence that could be used against him, permitting the seizure of the first and denying it as to the latter, though both were held in the same way. Such things as might be seized could be admitted in evidence over defendant's objection, though they were taken from his possession and against his consent. * * * So we see that it is not the fact that the thing was taken from his possession and against his consent that was forbidden, but it was the character of the things taken and the method of taking. Such a thing as burglar tools, though bought or made by defendant, and belonging to him as much as his private books and papers, could be taken and used against him, and it was not compelling him to be a witness against himself to take them from him. * * *
>
> Now, we see that no warrant shall be issued, but upon probable cause, etc. This certainly contemplates that a crime has been committed, and there is probable cause to believe that the defendant has committed it, or has certain things used in the commission of it, etc., which he is secreting, and describing the thing and place. Now, if the crime, instead of having been committed or completed, is only in the process of commission, it is manifest no warrant could be issued. There must be a

> completed crime, an affidavit of probable cause, and thing to be seized. This makes a complete analogy to a warrant for the arrest of a person for the commission of an offense. If the offense has been committed, the officers must have a warrant to make the arrest; but, if the offense is committed in his presence, he may arrest without a warrant. * * * The analogy between arresting and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case.

The principal feature which removes the instant case from the constitutional inhibition is the fact that the act of the officers was not directed to the securing of evidence of a crime which had been committed, but to the actual suppression of a crime then in the course of perpetration. The officers saw a car stop in front of defendant's house. They saw a young man get out, go up to the house, and soon return with a bottle handed to him by the defendant. They saw a number of people about the house. They knew the reputation of the defendant and had information that he was violating the law. They also knew that there were no Government registered distilleries in that State. They therefore had reasonable grounds to believe that defendant was selling whisky on which the tax had not been paid. If so, it was their duty under the statute to examine the same and to seize it if contraband. As Officer Gosnell approached the house, not only did the purchaser of the bottle flee, but the defendant grabbed a larger vessel and fol-

lowed, giving the officer further grounds to believe that defendant was attempting to conceal the fruits of his crime.

It is submitted that the foregoing facts, made known to the officers by observation coupled with their knowledge of defendant's reputation, were ample to draw the inference that defendant was then trafficking in illicit distilled spirits and constituted sufficient probable cause to render the action of the officers reasonable. The officers saw in defendant's possession the very thing which the statute (R. S. 3296) prohibited his having. The defendant was then committing a felony in their presence. (Criminal Code, Sec. 335.) It therefore became their duty, even if they were then trespassers on defendant's property, to take reasonable measures to prevent further infraction of the law by attempting to seize the instruments by which the crime was being committed. Their right and duty in this respect was the same as if they had seen a murder being committed or an illicit still in operation on the premises. The right included not only a search of defendant's person, but of his premises, for his premises were no more sacred than his person or his liberty. As was said in *Agnello* v. *United States*, 290 Fed. 671, 679:

> We may add that the right to be secure in his property is no more sacred than the right to be secure in his person. And in the cases in which the officer may without a warrant deprive a man of his sacred right to his liberty

> he may without a warrant deprive him of his no more sacred right of property in the articles that may be used in evidence against him upon the trial for the crime for which he is arrested. His home or his office is no more sacred than his person or his liberty. Such a search and seizure is not, in our opinion, the unreasonable search and seizure which the Fourth Amendment prohibits.

Especially is this so in the instant case, where no search was made of defendant's house, but only of the lands and premises of his father with whom he lived. The right to search the premises where a crime was committed in the officers' presence has been upheld in the following cases:

Herine v. *United States*, 276 Fed. 806.
Vachina v. *United States*, 283 Fed. 35.
Kathriner v. *United States*, 276 Fed. 808.
United States v. *Hilsinger*, 284 Fed. 585.
McBride v. *United States*, 284 Fed. 416.

True, the officers had no positive knowledge of the contents of the bottle or jug before the search and seizure was attempted. But such positive knowledge was not required. In *United States* v. *Hilsinger*, 284 Fed. 585, 589, it was said:

> The question whether the officer must have direct knowledge of the contents of the package in transit is an interesting one. He never, by looking at the outside of a box, barrel, or bottle, can actually know what is inside of it. He may have good cause to believe from the label or from the looks of it, from reliable in-

> formation, or from the situation and circumstances, but he never can know what is inside of it; and if there must be a search warrant issued upon direct evidence of the alcoholic contents of the vessel, first-handed evidence, it can never be seized, or practically so. A similar question has often arisen with regard to the carrying of concealed weapons, whether the officer must have first-hand knowledge that one has a concealed weapon before he can arrest him for carrying it. It has been held that an officer has a right, upon reasonable and probable cause, upon such information as would lead one having due regard to the rights of others to act, to arrest, and search for carrying concealed weapons.

In *Ex parte Morrill*, 35 Fed. 261, 267, it was said:

> A crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe, or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime.

After defendant had abandoned the whisky, and even before that time, it was the right of the Government to seize it. The moment it was removed without payment of the tax it became forfeited to the United States. (Sec. 3299, R. S.) The liquor

was contraband and defendant had no property right in it. The action of the officers in attempting to seize it related to property not only in defendant's illegal possession, but to that in which the United States had a legitimate and proper interest. *Boyd* v. *United States*, 116 U. S. 616; *O'Connor* v. *United States*, 281 Fed. 396; *United States* v. *Fenton*, 268 Fed. 221; *Welsh* v. *United States*, 267 Fed. 819; *United States* v. *Hilsinger*, 284 Fed. 585; *United States* v. *Snyder*, 278 Fed. 650.

The seizure of goods concealed to avoid taxes payable on them has been authorized by the revenue acts from the beginning of the Government. In the case of excisable or dutiable articles the Government has an interest in them for the payment of the taxes, and until such taxes are paid has a right to keep them under observation or to pursue them and drag them from concealment. *Boyd* v. *United States*, 116 U. S. 616, 623–624.

Typical of the statutes referred to in the *Boyd case* is Section 3453, Revised Statutes of the United States, which provides that all articles on which taxes are imposed, which shall be found in the possession or custody or within the control of any person for the purpose of being removed by him in violation of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district. Section 3177 of the Revised Statutes authorizes any collector or deputy collector to enter, in the

daytime, any building or place where any articles subject to tax are kept, within his district, so far as it may be necessary, for the purpose of examining the articles. It was held in *United States* v. *Fears*, Fed. Case No. 15080 (3 Woods, 510, Circuit Court, Northern District of Georgia), that under those sections a collector or deputy collector of internal revenue may, without process, enter any building where distilled spirits, subject to tax, are kept, so far as may be necessary for examining the same, and may without process seize illicit distilled spirits. Section 3298, R. S., provides that an internal-revenue officer may detain, for a designated period, any cask or package containing, or supposed to contain, distilled spirits upon which he has reason to believe the tax has not been paid, and Section 3299, R. S., provides for the forfeiture to the United States of distilled spirits unlawfully removed from a distillery. Many other provisions may be found in the internal-revenue laws relating to the forfeiture of articles removed, concealed, or sold with the intent to defraud the United States of the tax due thereon. See Revised Statutes, United States, Title XXXV, Chap. 11.

III.

Defendant was not compelled to be a witness against himself.

The "intimate relation" between the Fourth and Fifth Amendments suggested in the *Boyd case*, *supra*, p. 633, is not so close as to require the exclusion of incriminating testimony on the ground that it

compels a defendant to be a witness against himself, simply because knowledge of the facts sworn to was acquired while the witness was acting as agent for the Federal Government. The limitations of the Fourth Amendment reach only the Federal Government and its agents. *Weeks* v. *United States*, 232 U. S. 383. The protection of the Fifth Amendment has no such limitation. So if Gosnell and King were acting officially as deputy collectors of internal revenue, and as such were making search when they observed the defendant's conduct in regard to the whisky, and when they examined the liquor, the reasonableness or unreasonableness of their search can have no bearing upon the effect of their testimony. They merely recited certain facts ascertained by them, as any other witness might have done.

The contention of the plaintiff in error that the testimony of Gosnell and King in effect compelled him to be a witness against himself would, if sustained, establish a precedent making every man's premises an inviolable sanctuary where he would be free openly to violate the criminal laws of the land without fear of penalty resulting from the testimony of any persons who on those premises happened to observe him *in flagrante delicto*. By such a rule a man might be protected in the commission of any crime on his own premises if the only evidence obtainable against him happened to be the testimony of persons observing his acts while technically trespassers upon his lands.

This is quite a different situation from that existing in the cases upon which the plaintiff in error relies. The distinction exists in the very nature of the questions there and here before the court, and in the difference in the kind of evidence there and here involved. So far as compelling a person to be a witness against himself is concerned, there is no proper analogy between the evidence disclosed by a defendant's own private books and papers, compulsorily taken from him, and oral testimony of his criminal acts based on knowledge acquired by observation.

The history, purpose, and proper application of the doctrines embodied in the Fourth and Fifth Amendments have been so exhaustively discussed by the courts and text writers that further elaboration of the subject here would not be of material aid to the court. (Notes in 3 American Law Reports Annotated, pp. 1514–1522; 20 id., 652–654; 24 id., 1408–1426; 59 Lawyers Reports Annotated, pp. 465–477; id., 1915–B, 834–843; 1916–E, 715–717.)

IV.

CONCLUSION.

It is respectfully submitted that there was in this case no invasion of plaintiff in error's constitutional rights against unreasonable search and seizure, because (1) there was in fact no search or seizure; (2) if there was a search or seizure it was not unreasonable, because (*a*) there was probable cause to believe that a crime was being committed in the

officers' presence, (*b*) the property searched for and seized was the legitimate object of search and seizure; and (3) even if the search and seizure was unconstitutional and invalid, the testimony of the officers in regard thereto was not incompetent. The judgment should be affirmed.

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APRIL, 1924.

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23